77-1011

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

JANUARY TERM, 1978

No. 77-~~1107~~

GUSTAVO PASSARELLI,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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GUSTAVO PASSARELLI,

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Undersigned Counsel, on behalf of the Petitioner, Gustavo Passarelli, petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case entered on October 20, 1977, affirming in part a judgment of the United States District Court for the Southern District of New York, convicting the Petitioner of having conspired to violate Title 18, United States Code, Section 656 and Title 18, United States Code, Section 1014, in violation of Title 18, United States Code, Section 371 and of substantive violations of Title 18, United States Code, Section 656 and Title 18, United States Code, Section 1014. The judgment of the United States Court of Appeals for the Second Circuit reversed the judgment of the United States District Court for the Southern District of New York, convicting the Petitioner of having

violated Title 18, United States Code, Section 656 and remanded the case for a new trial as to that part of the judgment of the District Court.

A petition for rehearing and determination en banc was made on the 10th day of November, 1977 which petition was denied on December 20, 1977. On or about November 8, 1977, the Petitioner made a motion to the United States Court of Appeals for the Second Circuit for continuance of bail pending determination of the petition for rehearing and determination en banc and in the event said petition was denied, pending determination of petition for a Writ of Certiorari to the Supreme Court of the United States. The motion for continuance of bail was granted on November 22, 1977.

Opinions Below

There was no formal opinion of the District Court. The opinion of the Court of Appeals affirming and in part reversing the judgment of the District Court has not yet been reported. It is set forth in Appendix A to this Petition. The decision of the Court of Appeals denying Petitioner's petition for a rehearing and suggestion that it be reheard en banc has not been reported. It is reproduced in Appendix A of this Petition.

Jurisdictional Statement

The judgment of the Court below (Appendix A, Infra) was entered on October 20, 1977. A petition for rehearing and determination en banc was filed on November 10, 1977 and was denied on December 20, 1977 (Appendix B, Infra).

The grounds upon which the jurisdiction of this Court is invoked are Title 28, United States Code, Section 1254 (1) and Rule 37 (b) of the Federal Rules of Criminal Procedure.

Questions Presented

During the trial and on appeal the Petitioner claimed that the District Court erred in rejecting evidence offered by the Petitioner to prove offers to repay certain loans prior to his indictment or any investigation by the government which led to his indictment. The loans involved were those concerning which the Petitioner was indicted for allegedly violating Title 18, United States Code, Section 656 and Title 18, United States Code, Section 1014. It was the Petitioner's contention that evidence as to offers to repay were probative on the question of whether he had an intent to injure and defraud. It was Petitioner's further contention that an intent to injure and defraud is an essential element to his conviction under both Title 18, United States Code, Section 656 and Title 18, United States Code, Section 1014. It was the Petitioner's contention that with regard to his alleged violation of Title 18, United States Code, Section 1014, the government had the burden of proving that if he made a misrepresentation of fact in a financial statement or loan application, that misrepresentation had to be of a material fact, i.e., a fact that would influence the lending institution in arriving at a decision as to whether it would or would not make the particular loan. Both the District Court and Circuit Court of Appeals rejected this contention of the Appellant. However, the Circuit Court of Appeals did not reject the Petitioner's contention so far as it related to evidence of offers to repay as being probative and admissible on the question of the Petitioner's intent to injure or defraud with regard to those counts of the indictment which charged a violation of Title 18, United States Code, Section 656. As to those counts, the Petitioner's conviction was reversed and the case was remanded for a new trial.

The Court of Appeals in affirming the Petitioner's conviction as to the substantive violations of Title 18, United

States Code, Section 1014, while reversing his conviction as to the substantive violations of Title 18, United States Code, Section 656, failed to recognize the prejudicial effect the rejection of the evidence of offers to repay had on Petitioner's defense that he did not have an intent to mislead the lending institution. It is the Petitioner's contention that an intent to mislead the lending institution is equivalent to an intent to injure and thus the rejection of evidence of offers to repay prevented the jury from examining evidence which might be probative on his intent or lack of intent to mislead the bank.

During the trial the Petitioner requested an instruction that with regard to the counts of the indictment, which alleged a violation of Title 18, United States Code, Section 1014, the jury must find that the alleged false statements were false as to a material matter, i.e., that they had a natural tendency to influence or were capable of influencing the decision of the Bank. The District Court rejected the requested instruction. The Court of Appeals affirmed the District Court stating at page 6332 of its decision that "In any event, any question of materiality would be for the Court, not the jury". The Petitioner contends that this decision was erroneous.

The Petitioner further contends that the evidence was insufficient as a matter of law to support his conviction of having violated Title 18, United States Code, Section 1014 and that as to Count 10 of the indictment there was a fatal variance between the indictment and the proof.

The specific questions raised in this Petition for a Writ of Certiorari are as follows:

1. Whether a specific intent to mislead the bank is an essential element of the crime of violating Title 18, United States Code, Section 1014.

2. Whether the District Court erred in rejecting the Petitioner's requested instruction that the jury must find his

statements were false as to some fact which had a natural tendency to influence or was capable of influencing the decision of the bank in order to find Petitioner guilty of violating Title 18, United States Code, Section 1014.

3. Whether the District Court erred in failing to make any finding as to the materiality of the alleged false statements.

4. As to Count 10 of the indictment, whether there was a fatal variance between the indictment and the proof.

5. As to Count 10 of the indictment, whether the District Court erred in rejecting offers to repay the loan in question.

6. As to Count 12 of the indictment whether the verdict was contrary to the weight of the evidence and whether it is supported by substantial evidence.

7. Whether the Court below erred when it affirmed the Petitioner's judgment of conviction as to Counts 10 and 12 of the indictment.

Statement of Case

The Appellant, Gustavo Passarelli, was charged along with the defendants, William H. Cleary and Jerome S. Healy in twelve counts of a 16 count indictment with having conspired with each other to violate Title 18 United States Code, Section 656 and Title 18 United States Code, Section 1014 in violation of Title 18, United States Code, Section 371 and with substantive violations thereof. Count 1 of the indictment is the conspiracy count; Counts 2 through 8, inclusive of the indictment allege substantive violations of Title 18 United States Code, Section 656; Counts 9 through 12, inclusive of the indictment allege substantive violations of Title 18 United States Code, Section 1014. The Appel-

lant was also charged in Counts 2 through 12, inclusive of the indictment with the crime of aiding and abetting.

In substance, the indictment alleges that the Appellant, Gustavo Passarelli and the defendant, Jerome Healy, conspired together and with the defendant William H. Cleary, an Assistant Manager of the Barclays Bank of New York, a bank the deposits of which were insured by the Federal Deposit Insurance Corporation, to misapply the moneys, funds and credit of said bank and to make false statements of material facts upon applications for loans and financial statements for the purpose of influencing the action of said bank.

The Appellant, Gustavo Passarelli, was charged in Counts 2 through 8 inclusive of the indictment with aiding and abetting the defendant, William H. Cleary with misapplication of bank funds with regard to seven $5,000.00 loans made by the defendant, William H. Cleary, on behalf of the Barclays Bank of New York. The Appellant was also charged in Counts 9 through 12 inclusive of the indictment with making false statements of material facts upon applications and financial statements with regard to four loans made by the Barclays Bank of New York.

Prior to trial the defendant, Jerome F. Healy, pleaded guilty. He testified as a government witness during the trial. The Appellant, Gustavo Passarelli, and the defendant, William H. Cleary, were tried together.

The jury returned a verdict of guilty against the Appellant as to Count 1, 3, 4, 5, 7, 8, 10 and 12 of the indictment. Count 1 of the indictment is the conspiracy count. Counts 3, 4, 5, 7 and 8 allege violations by Appellant as an aider and abettor of Title 18, United States Code, Section 656. Counts 10 and 12 of the indictment allege violations of Title 18, United States Code, Section 1014.

The defendant, William H. Cleary, who was an officer of the Barclays Bank of New York was found not guilty on

Counts 3, 4 and 5 of the indictment. On motion by the Appellant, his convictions on said three counts were reversed as the Appellant could not as a matter of law be guilty as an aider and abettor if the principal who was the bank officer was found not guilty.

In substance the indictment alleges that the Appellant Passarelli and the defendants, Jerome S. Healy and William H. Cleary, conspired to violate Title 18, United States Code, Sections 656 and 1014 and that in fact the defendants did violate said Federal Statutes.

The Appellant appealed his convictions on Counts 7, 8, 10 and 12 of the indictment. This Court reversed the Appellant's conviction as to Counts 7 and 8 of the indictment and affirmed as to Counts 10 and 12 of the indictment.

Count 10 of the indictment alleges that the Appellant made a materially false statement on October 22, 1975 with regard to a $5,000.00 loan made that date and that the name of the borrower on the loan application or financial statement was Carmine Liberatore.

Count 12 of the indictment alleges that the Appellant made a materially false statement on November 25, 1975 with regard to a $5,000.00 loan made that date and that the name of the borrower on the loan application or financial statement was Thomas Powers.

On appeal to the United States Court of Appeals the Appellant contended that the District Court erred in refusing his requested instruction on "materiality". The requested instruction reads as follows:

"Materiality"

> "In order to determine whether any statement is false as to a material matter, you must decide whether the statement was false and whether the statement had a natural tendency to influence or was capable of influencing the decision of the person or institution

to whom submitted in making a determination required to be made."

This court held that the District Court did not err in refusing the Appellant's requested instruction as any question of "materiality" would be for the Court, not the jury.

The Appellant further contended on appeal that the evidence with regard to Count 12 of the indictment was insufficient as a matter of law to support the conviction. The Court of Appeals rejected this contention. The Appellant believes this Court erred.

With regard to Count 10 of the indictment, although the indictment states that the name of the borrower on the loan application or financial statement was Carmine Liberatore there was no evidence that a loan was applied for by the Petitioner on behalf of said Carmine Liberatore although there was a financial statement filed with the bank bearing the name Carmine Liberatore which financial statement was signed by the Petitioner. Carmine Liberatore testified that the Petitioner did not have authority to sign his name to the financial statement. A loan, however, was made to 8626 Realty Corp., a corporation controlled by the Petitioner. However, there was neither a loan application or financial statement submitted for 8626 Realty Corp. The corporate note had the name of Carmine Liberatore as vice-president and was personally endorsed by the Petitioner. The Petitioner signed the name of Carmine Liberatore to the corporate note as vice-president. Carmine Liberatore testified that he was not vice-president of the corporation and that he did not authorize the Petitioner to sign his name to the note as the corporate vice-president. The District Court rejected evidence that 8626 Realty Corp. offered to repay the loan.

With regard to Count 12 of the indictment which was a loan of $5,000.00 made to one Thomas Powers, there was no evidence offered to prove that the Petitioner knew

of any false statements on the financial statement or loan application or that he had seen either until after the loan had been made by the bank. The evidence was to the contrary.

Argument in Support of Petition for Writ of Certiorari with Respect to Points 1-5 inclusive.

Title 18, United States Code, Section 1014 requires proof that the defendant had a specific intent to mislead the bank. *United States* v. *Sabatino*, 485 F. 2d 540 (2d Cir. 1973). Whether a false statement is material is probative material and relative on the issue of whether the defendant had a specific intent to influence and mislead the bank. The statement must have the capacity to influence in order to negate innocent intent. *United States* v. *Kernodle*, 367 F. Supp. 844 (D.C.N.C. 1973); *United States* v. *Goberman*, 458 F. 2d 226 (3rd Cir. 1972).

The Petitioner requested the following instruction on "materiality" which was rejected by the District Court:

> "In order to determine whether any statement is false as to a material matter, you must decide whether the statement was false and whether the statement had a natural tendency to influence or was capable of influencing the decision of the person or institution to whom submitted in making a determination required to be made".

The Petitioner was entitled to the requested instruction so that his counsel could argue to the jury that certain of the allegedly false statements with regard to Count 10 of the indictment were not material and were not made for the purpose of influencing the bank. The Circuit Court of Appeals held that the instruction given by the District Court was sufficient. That instruction read as follows:

> "In order to convict Passarelli, it must find that the false statements were made for the purpose of influ-

encing the Bank's action on the application and defined the phrase 'for the purpose of influencing' as meaning that the person making the false statements intended the Bank to take action because of them".

The Court of Appeals then stated at page 6332 of its opinion that "In any event, any question of materiality would be for the Court, not the jury".

The Petitioner contends that the decision of the Court of Appeals is erroneous. Firstly, the instruction given by the District Court did not establish "materiality" as a standard by which the jury could determine whether a statement was intended to influence the bank. Secondly, the District Court judge did not make a finding that the allegedly false statement was in fact material. Therefore, if the question of materiality is for the Court, not the jury, the Court failed to rule on this vital question. This error was particularly prejudicial with regard to Count 10 of the indictment where the alleged false statements concerned a financial statement of Carmine Liberatore, who did not apply for a loan and to whom no loan was made, nor was any loan made which was predicated upon his financial statement or guaranty.

Furthermore, the District Court erred in rejecting evidence of offers to repay with regard to Count 10 of the indictment which was a loan of $5,000.00 made to 8626 Realty Corp. The fact that the corporation offered to repay the loan was relevant, probative and material as to the question of the materiality of the corporate note not being signed by an officer of the corporation but by the Petitioner signing the name Carmine Liberatore, vice-president. Obviously, the offer to repay shows that the corporation considered the loan a valid obligation. This is relevant, probative and material on the question of Petitioner's intent to mislead and influence the bank.

Finally, Count 10 of the indictment states the name of the borrower on the loan application or financial statement

as Carmine Liberatore. The proof of the trial showed a loan to 8626 Realty Corp. There was no evidence of a loan application or financial statement being submitted to the bank on behalf of 8626 Realty Corp. The indictment did not allege any false statement made by the Petitioner with regard to the loan made to 8626 Realty Corp. The variance between the indictment and the proof at trial was prejudicial to the Petitioner and was fatal. This variance cannot be separated from the question of materiality as it relates to the financial statement of Carmine Liberatore. Count 10 of the indictment was misleading as the Petitioner was convicted of making a false statement to obtain a loan for 8626 Realty Corp. whereas the indictment does not allege that the Petitioner applied for a loan for 8626 Realty Corp. as the borrower. The Court of Appeals did not address itself to the variance between the indictment and the proof. One thing is certain and that is that Carmine Liberatore was not a borrower nor did he apply for a loan as alleged in Count 10 of the indictment. For this reason alone, the Petitioner's conviction on Count 10 should be reversed.

Argument in Support of Petition for Writ of Certiorari With Respect to Point 6.

As to Count 12 of the indictment, the government did not offer any evidence to prove that the Petitioner knew of any of the information in the loan application or financial statement of Thomas Power, the borrower, at the time it was submitted to the bank. Neither the loan application nor financial statement was prepared or submitted by the Petitioner. The Court of Appeals did not address itself to this issue which was raised by the Petitioner's brief on appeal.

CONCLUSION

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Spring Valley, N. Y. 10977

Appendix A, Opinion.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1436, 1441—September Term, 1976.

(Argued August 19, 1977 Decided October 20, 1977.)

Docket Nos. 77-1107 and 77-1146

UNITED STATES OF AMERICA,

Appellee,

v.

WILLIAM H. CLEARY and GUSTAVO PASSARELLI,

Defendants-Appellants.

Before:

VAN GRAAFEILAND and WEBSTER,* *Circuit Judges,*
and DOOLING, *District Judge.***

Appeal from judgments of conviction for violations of 18 U.S.C. §§ 1014 and 656 following a jury trial before Carter, *J.*, in the United States District Court for the Southern District of New York.

Convictions of appellant Passarelli on Counts One, Ten and Twelve are affirmed. Convictions of appellant Passarelli and appellant Cleary on Counts Seven and Eight,

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* Of the Eighth Circuit, sitting by designation.

** Of the Eastern District of New York, sitting by designation.

and of appellant Cleary on Counts One, Six and Fourteen, are reversed, and on these counts the matter is remanded for retrial.

MORTON BERGER, Spring Valley, N. Y., *for Appellant Passarelli.*

DANIEL H. MURPHY, II, New York, N. Y. (Cowan, Liebowitz & Latman, P. C.), *for Appellant Cleary.*

RICHARD WEINBERG, Assistant U. S. Attorney (Robert B. Fiske, Jr., U. S. Attorney for the Southern District of New York; Robert J. Jossen, Asst. U. S. Attorney, of counsel), *for Appellee.*

VAN GRAAFEILAND, *Circuit Judge:*

In 1975, Gustavo Passarelli had no credit standing at Barclay's Bank of New York. However, he did have relatives, friends and several wholly owned corporations. With the aid of an unprincipled lawyer and a facile pen, he was able to obtain funds from the Bank through loans secured in the names of several of these individuals and companies.

As a result, he was convicted, after a jury trial in the Southern District of New York, on two counts of knowingly making false statements in loan applications and financial statements for the purpose of influencing the Bank, whose deposits were insured by the Federal Deposit Insurance Corporation.[1] 18 U.S.C. § 1014. He was also convicted of conspiring with the lawyer, Jerome F. Healy, and co-appellant William Cleary, assistant manager of Barclay's New Rochelle branch bank, to violate § 1014 and 18 U.S.C. § 656. Section 656, so far as pertinent, makes it a criminal offense for a bank officer willfully to

[1] Passarelli was acquitted on two counts of making false statements in violation of 18 U.S.C. § 1014.

misapply bank funds. Finally, he was convicted on two counts of aiding and abetting appellant Cleary in the violation of § 656.[2] On appeal, Passarelli challenges his conviction only on the two substantive counts charging the making of false statements and the two counts of aiding and abetting.

Affirmance of Passarelli's convictions for violation of § 1014 is clearly mandated. The Government's proof showed that, in connection with the application for a corporate loan, Passarelli forged the name of another individual as a corporate officer on two financial statements and a promissory note and furnished false information to Healy[3] for incorporation into the financial statements. The individual involved had never been a corporate officer and had not authorized the use of his signature. On the other loan which was supposedly made to one Thomas Powers, Passarelli falsely stated that Powers had purchased a boat from him and that the proceeds of the loan would be used to pay for the boat. Passarelli received half the proceeds of this loan, and the other half went to one Carl French who had forged Powers' name on the application, the note and the check. Mr. Powers had never purchased a boat from Passarelli and had no knowledge of the loan.

The district judge instructed the jury correctly that, in order to convict Passarelli, it must find that the false

[2] Cleary was charged with ten separate violations of § 656, and Passarelli was charged in seven instances with aiding and abetting these violations. The jury acquitted both on one count. It acquitted Cleary on five others but convicted Passarelli of aiding and abetting on three of them. Passarelli's convictions on these three were set aside by the district judge. It convicted Cleary on one count on which Passarelli was acquitted and on one count where Passarelli was not charged. It convicted both on only two counts.

[3] All of the loans from which Passarelli benefited were obtained from the Bank through attorney Healy. Prior to trial, Healy pled guilty to one count charging him with filing a false loan application and testified as a government witness.

statements were made for the purpose of influencing the Bank's action on the applications and defined the phrase "for the purpose of influencing" as meaning that the person making the false statements intended the Bank to take action because of them. *See United States* v. *Sabatino,* 485 F.2d 540, 544 (2d Cir. 1973), *cert. denied,* 415 U.S. 948 (1974). Appellant contends the district judge erred in rejecting his requested instruction that the jury must find his statements were false as to a material matter; *i.e.,* that they had a natural tendency to influence or were capable of influencing the decision of the Bank. This request misstates the law. The essence of the crime was the making of false statements with intent to influence the Bank, and whether or not the Bank was actually induced to rely upon them is irrelevant. *United States* v. *Goberman,* 458 F.2d 226, 229 (2d Cir. 1972); *Henninger* v. *United States,* 250 F.2d 849, 850 (10th Cir. 1965), *cert. denied,* 382 U.S. 979 (1966). "It does not lie with one knowingly making false statements with intent to mislead . . . to say that the statements were not influential or the information not important." *United States* v. *Sabatino, supra,* 485 F.2d at 544, *quoting Kay* v. *United States,* 303 U.S. 1, 5-6 (1938). In any event, any question of materiality would be for the court, not the jury. *United States* v. *Bernard,* 384 F.2d 915, 916 (2d Cir. 1967); *United States* v. *Alu,* 246 F.2d 29, 32 (2d Cir. 1957). There was no error in this portion of the charge, and the convictions on the two false application counts must stand.

For reasons which follow, we are reversing Cleary's conviction on the four counts of willful misapplication and remanding for a new trial. Passarelli's conviction as an aider and abetter on two of these counts must therefore be reversed. *Shuttlesworth* v. *City of Birmingham,* 373 U.S. 262, 265-66 (1963); *United States* v. *Giordano,* 489 F.2d 327, 330 (2d Cir. 1973).

Convictions of appellant Cleary on the conspiracy count and the four counts charging misapplication of bank funds

are reversed because of errors in the exclusion of evidence and in the charge. The record is devoid of proof that Cleary was aware of the forgeries and false statements.[4] Indeed, the Government's witness, Healy, assured Cleary that Cleary was acting properly in making the loans. Cleary knew Healy to be a lawyer and relied upon him as such. There was no evidence that Cleary received any kickbacks or bribes because he approved the loans. *See Giragosian* v. *United States,* 349 F.2d 166, 169 (1st Cir. 1965). They were within the amount of his loaning authorization, and the procedures which he followed involved, at worst, violations of the Bank's normal operating procedures, violations insufficient in and of themselves to support a conviction.[5] *United States* v. *Docherty,* 468 F.2d 989, 992-95 (2d Cir. 1972); *Giragosian* v. *United States* supra, 349 F.2d at 169.

The thrust of the Government's charge against Cleary was that he approved loans to third persons knowing that the proceeds were going in whole or in part to appellant Passarelli. However, loans of this character are improper only if the lending officer had no reason to expect that the named debtor would repay them; *e.g.,* where the officer knew that the named debtor was fictitious, had not authorized the use of his name, or was incapable of repaying the loan, or where the bank official assured the named debtor that he would not be called upon to repay. *United States* v. *Gens,* 493 F.2d 216, 221-23 (5th Cir. 1974).

One of the loans at issue on this appeal was made to Joseph Passarelli, appellant Gustavo Passarelli's brother. Defense counsel attempted to inquire of the bank manager

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[4] Although Cleary was charged on five counts with filing false statements in violation of 18 U.S.C. § 1014, he was acquitted on all of them.

[5] The Government offered testimony that Cleary disregarded normal banking procedures in failing to interview borrowers personally and in failng to secure adequate financial statements and collateral security.

whether Joseph Passarelli had offered to repay the loan made in his name and indicated his intention of asking the same question about every borrower. The district judge sustained the Government's objection to the question asked and indicated on several occasions that he would not permit the matter to be pursued with regard to other borrowers. Thereafter he charged the jury, over defense objection, that "even if it was not Mr. Cleary's purpose to injure or defraud Barclay's Bank, if he knew that the natural effect of his actions would be to expose the bank to loss, injury or fraud, the requisite intent is established." He followed this up by charging that the Government need not establish that the Bank suffered any loss and that it was immaterial that moneys, once misapplied, may have been repaid.

These rulings effectively removed from the jury's consideration a very important item of proof bearing on Cleary's intent: *i.e.*, whether he could reasonably have expected that the named borrowers would honor their obligations. Payments or offer of payments by the named borrowers should not be completely disregarded when this issue is under consideration. *See United States* v. *Matot,* 146 F.2d 197, 198-99 (2d Cir. 1944). Where the question of intent is of supreme importance, where the case is a close one, and where there is no proof that the defendant profited from the transaction in question, testimony bearing on the issue of his good faith should not be excluded. *United States* v. *Wicoff,* 187 F.2d 886, 890-91 (7th Cir. 1951); *United States* v. *Matot, supra,* 146 F.2d at 198-99; *cf. United States* v. *Boyd,* 446 F.2d 1267, 1272 (5th Cir. 1971).

The district court charged that if Cleary knew that "natural effect" of his conduct was to expose the Bank to loss, there was an intent to defraud, and then told the jury that it was immaterial whether the Bank suffered a loss. Once the Government has established a defendant's intent to defraud and the misapplication of funds, the success or failure of his efforts may be immaterial, *see United States*

v. *Fortunato,* 402 F.2d 79, 80-81 (2d Cir. 1968), *cert. denied,* 394 U.S. 933 (1969); and, to this extent, the district judge's charge was correct. However, where the issue of a defendant's intent will be determined in large measure by whether a named debtor was willing and able to repay his loan, proof of actual payment or offer of payment must have some pertinence. *Cf. United States* v. *Docherty, supra,* 468 F.2d at 995. In determining what the "natural" effect of a defendant's conduct may be, the "actual" effect can seldom be without relevance. The jury should have been permitted to consider the latter in the narrow light of the former.

The case against Cleary was a close one. The district judge accurately described Cleary's alleged criminal conduct as "baffling". The interests of justice require that another jury be given the opportunity to determine the question of Cleary's criminal intent, after consideration of all the pertinent facts and under a proper charge from the court.

Convictions of appellant Passarelli on Counts One, Ten and Twelve are affirmed. Convictions of appellant Passarelli and Cleary on Counts Seven and Eight and of appellant Cleary on Counts One, Six and Fourteen are reversed; and on these counts, the matter is remanded for retrial.

Appendix B, Order, United States Court of Appeals, Second Circuit, Denying Petition for Rehearing.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twentieth day of December, one thousand nine hundred and seventy-seven.

Present: Honorable Ellsworth Van Graafeiland

Honorable William H. Webster
Circuit Judges

Honorable John F. Dooling
District Judge

77-1107

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

WILLIAM H. CLEARY,
GUSTAVO PASSARELLI,

Defendants-Appellants.

A petition for a rehearing having been filed herein by counsel for the appellant Gustavo Passarelli

Upon consideration thereof, it is

Ordered that said petition be and hereby is DENIED.

A. Daniel Fusaro,
Clerk

Appendix C, Order, United States Court of Appeals, Second Circuit, Denying Petition for Rehearing en Banc.

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twentieth day of December, one thousand nine hundred and seventy-seven.

77-1107

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

WILLIAM H. CLEARY,
GUSTAVO PASSARELLI,

Defendants-Appellants.

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed herein by counsel for the appellant Gustavo Passarelli, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

IRVING R. KAUFMAN
IRVING R. KAUFMAN, Chief Judge

Appendix D, Order, United States Court of Appeals, Second Circuit, Granting Petition to Extend the Time to File a Petition for Rehearing and Rehearing en Banc.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fourteenth day of November, one thousand nine hundred and seventy-seven.

United States of America,

Plaintiff-Appellee,

v.

William H. Cleary, Jerome Healy, Gustavo Passarelli,

Defendants,

William H. Cleary, Gustavo Passarelli,

Defendants-Appellants.

It is hereby ordered that the motion made herein by counsel for the appellant Gustavo Passarelli to extend the time to file a petition for rehearing and rehearing *en banc* and to stay the issuance of the mandate pending determination of the petition for rehearing and rehearing en banc be and it hereby is granted

It is further ordered that

E. Van Graafeiland
Circuit Judges

John F. Dooling
U.S.D.J.

Appendix E, Judgment and Probation Commitment Order, United States District Court, Southern District of New York.

United States of America vs.

Defendant:

Gustavo Passarelli

Docket No.: 76 Cr. 986 R.L.C.

In the presence of the attorney for the government the defendant appeared in person on this date:

Month	Day	Year
2	24	77

Counsel:

☐ Without counsel. However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ With counsel. Morton Berger Esq.

Plea:

☐ Guilty, and the court being satisfied that there is a factual basis for the plea, ☐ Nolo Contendere,

☒ Not Guilty.

Finding & Judgment:

There being a verdict of

☐ Not Guilty. Defendant is discharged.

☒ Guilty to counts 1, 7, 8, 10, 12,

Defendant has been convicted as charged of the offense(s) of Conspiracy to obtain loans from a bank by

means of false statements. (Title 18, United States Code, Section 371). unlawfully and knowingly abstracted and misapplied monies of said bank after loans had been approved and authorized. (Title 18, U.S. Code, Section 656 & 2). unlawfully, wilfully, and knowingly made false statements of material facts upon application for loans for the purpose of influencing the action of the Barclay Bank of New York. (Title 18, U.S. Code, Section 656 & 2).

SENTENCE OR PROBATION ORDER:

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period

Imposition of sentence is suspended on count 1. Two (2) YEARS imprisonment on counts 7, 8, 10, and 12, to run concurrently with each other, and on the condition that the defendant be confined in a jail type institution for a period of SIX (6) MONTHS, the execution of the remainder of the sentence is hereby suspended. The defendant is also placed on probation for a period of ONE HALF (1½) YEARS, subject to the standing probation order of this Court, and the defendant is FINED $2500.00 dollars on count 7 fine is to be paid in installments arranged through the probation department. Bail Pending Appeal is fixed at $10,000 unsecured personal recognizance bond.

SPECIAL CONDITIONS OF PROBATION:

Entered on Docket 2-25-77.

ADDITIONAL CONDITIONS OF PROBATION:

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION:

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

Certified as a true copy on this date .....

By .....

Signed by

☒ U.S. District Judge

☐ U.S. Magistrate

ROBERT L. CARTER

(SEAL)

Appendix F, Order, United States Court of Appeals, Second Circuit, Granting Petition to Continue Appellant on Bail and for a Stay.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-second day of November, one thousand nine hundred and seventy-seven.

United States of America,

Plaintiff-Appellee,

v.

William H. Cleary, Jerome Healy, Gustavo Passarelli,

Defendants,

William H. Cleary, Gustavo Passarelli,

Defendants-Appellants.

It is hereby ordered that the motion made herein by counsel for the appellant Gustavo Passarelli dated November 8, 1977 to continue appellant on bail and to stay the issuance of the mandate pending determination of the petition for rehearing and rehearing en banc and should said petition be denied, to stay issuance of the mandate pending application to the Supreme Court of the United States for a writ of certiorari pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure be and it hereby is granted.

It is further ordered that

E. A. Van Graafeiland, U.S. Cir. Judge
J. F. Dooling, USDJ

Circuit Judges